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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM M. BRINTON, an individual, *Petitioner,*

v.

DEPARTMENT OF STATE, an agency of the United States Government, and CYRUS R. VANCE, in his capacity as Secretary of State, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED

Whether the lower federal courts erred in their interpretation of Exemption Five of the Freedom of Information Act, 5 U.S.C. 552(b)(5), to uphold the Department of State's refusal to release opinions of the Office of the Legal Adviser concerning the status of the Israeli presence on the West Bank, Gaza Strip and Golan Heights under international law?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner, William M. Brinton, an individual, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on September 3, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at

_____ F.2d _____ (1981). A copy of the slip opinion is included in the Appendix as Exhibit A.

JURISDICTION

Jurisdiction in this case is premised upon 28 U.S.C. §1254(1) for review of certiorari of the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit. A written opinion filed by Circuit Judge Wilkey was issued by that court on September 3, 1980. The petitioner's, William M. Brinton's, motion for leave to file a motion for extension of time and motion to extend time were granted on November 6, 1980. The petitioner timely filed a petition for rehearing and suggestion for rehearing *in banc*. That petition was denied by the panel which rendered the original decision and by the circuit judges of the Court of Appeals on December 9, 1980. Copies of these orders are included in the Appendix as Exhibits B and C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the Freedom of Information Act, 5 U.S.C. 552, are set forth in the Appendix as Exhibit D.

STATEMENT OF THE CASE

On October 4, 1977 William M. Brinton ("Brinton") made a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, for copies of opinions of the Legal Advisor of the Department of State regarding the status under international law of the Israeli presence on the West Bank, Golan Heights and Gaza Strip since June, 1967. The Department of State

("Department"), in its response dated January 9, 1978, advised Brinton that it located nine (9) documents of which one, Document 6, was releasable. The remaining eight (8) documents were withheld from release under Exemption One[1], Exemption Five[2] or both of FOIA. Brinton initiated an action in United States District Court for the District of Columbia (Judge Louis F. Oberdorfer) to compel release of the withheld documents on January 23, 1978. The Department's answer was filed on March 9, 1978.

Brinton promptly sought to depose a Deputy Legal Adviser concerning the classification procedures employed and regarding the maintenance of confidentiality of the withheld documents. A protective order was sought by the Department and granted on April 6, 1978. Thereafter, the Department filed a motion for dismissal or, in the alternative, summary judgment on May 9, 1978. The Department urged that the withheld documents were exempt under Exemption One as properly classified and Exemption Five as protected by the attorney-client privilege. It was also contended that Brinton had failed to exhaust his administrative remedies. In his memorandum in opposition Brinton challenged these contentions and claimed that the documents were improperly classified and not privileged.

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[1] Exemption One protects from disclosure those documents which "are specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order."

[2] Exemption Five protects from disclosure "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency."

Brinton also asserted that he had exhausted his administrative remedies and had need of discovery. Oral argument was heard on June 2, 1978.

The District Court's order of November 30, 1978 denied the Department's motion to dismiss and retained under advisement the Department's motion for summary judgment as well as Brinton's motion for discovery. The order also directed the Council on Classification Policy ("Council") of the Department of State, the administrative body charged with handling FOIA appeals, to provide the District Court with an advisory opinion as to whether the documents were properly classified.

The Council advised the District Court, in the form of an affidavit of its acting Chairman William D. Blair, Jr. on January 3, 1979 that many of the documents had been declassified and would be released to Brinton. When no such release was effected, Brinton renewed his efforts to make discovery on February 26, 1979. The Department's motion to stay the proceedings was granted on March 7, 1979. On March 2, 1979 and March 20, 1979 affidavits by William D. Blair, Jr. and Alfred L. Atherton, Jr. as well as the Department's memorandum of law were filed with the District Court. Those affidavits revealed the reclassification of many of the documents as well as the release of Document 1 and portions of 2, 5, 7 and 8 and purported to establish that the documents had been prepared in the context of the attorney-client relationship. Brinton filed a memorandum in opposition on March 30, 1979.

The District Court's order and memorandum, entered on June 8, 1979, granted the Department's motion for summary judgment on the grounds that the documents were protected by Exemption Five,

specifically as the "product of the attorney-client relationship." The Court also held that the names of the attorneys were exempt from release under the deliberative process privilege of Exemption Five. Moreover, the court declined to make an *in camera* review. The order made no finding as to the Department's Exemption One claim. The District Court's decision, which is reported at 476 F.Supp. 535 (D.D.C., 1979) is included in the Appendix as Exhibit E.

The decision was timely appealed to the United States Court of Appeals for the District of Columbia Circuit. In his brief filed on October 15, 1979, Brinton argued that the attorney-client privilege was not applicable to the withheld documents since an essential element of the privilege, that the documents for which it is claimed are based on confidential information provided for the client *to* the attorney, had not been demonstrated. Further, Brinton argued that the District Court had failed to make the independent review required under FOIA by its undue deference to the Department's expertise in foreign affairs. The Department's brief of December 7, 1979 urged that the District Court's decision be upheld and that Exemption Five was applicable to the documents by reason of both the attorney-client privilege and the deliberative process privilege. Oral argument was heard on June 9, 1980.

In its decision of September 3, 1980, the Court of Appeals, per Circuit Judge Wilkey, did hold that all the elements of the attorney-client privilege had not been shown to be present and and that the documents could not be withheld on that basis. However, the Court of Appeals did sustain the Department's refusal to release the documents under the deliberative process privilege of Exemption Five. The Court of Appeals concluded that

the withheld documents were not final opinions of the Department and did not constitute secret law.

Brinton, after his motion for extention of time was granted, filed a petition for rehearing and a suggestion for rehearing *in banc*. This petition and suggestion were denied by the original panel and the sitting circuit judges of the Court of Appeals for the District of Columbia Circuit on December 9, 1980.

REASONS FOR GRANTING THE WRIT

Exemption Five of FOIA, if misconstrued, could effectively insulate almost all government documents from public release. This Court, through its decisions in *EPA* v. *Mink*[3] and *NLRB* v. *Sears*[4], has clarified the scope of the Exemption by incorporating through analogy some of the privileges recognized in civil discovery. One such privilege the deliberative process privilege, has developed primarily in the FOIA context as a means of protecting freedom of expression within the government, at intermediate levels in the decision making process. The lower courts in this instance have misrepresented those efforts at clarification and have so denied the privileges encompassed by Exemption Five as to cloak clearly releasable documents.

The documents which were the subject of Brinton's request were memoranda of law[5], prepared by the Office of Legal Adviser of the Department of State concerning the status under international law of the Israeli presence

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[3] 410 U.S. 85 (1973)

[4] 421 U.S. 132 (1975)

[5] A listing of the documents may be found in the District Court's decision, 476 F.Supp. 535, 537-8 (D.D.C. 1979) (see Exhibit E)

on the West Bank, Gaza Strip and Golan Heights since 1967. As noted by the United States Court of Appeals for the District of Columbia Circuit in *Coastal States Gas Corporation* v. *Department of Energy*[6], "in order to determine whether the agency's claim that the documents were properly withheld is valid, an understanding of the function the documents serve within an agency is crucial. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975)."

It is clear what functions the documents did not serve. They were not prepared as part of an established administrative process where their preparation was but an interim step in the metamorphisis of the final decision as were the NLRB General Counsel's Advise and Appeals Memoranda in *NLRB* v. *Sears, supra*. Similarly, the nature of the requested documents herein was not of a predecisional nature as were the Regional Board Reports in *Renegotiation Board* v. *Grumman Aircraft Engineering Corporation.*[7] The requested legal memoranda were not prepared by the Legal Adviser as part of any administrative or adjudicatory process. As a consequence of their preparation, no contract was awarded and no administrative decision was taken. Accordingly, to conclude, as the Court of Appeals did herein, that the requested documents were exempt from disclosure because they were prepared as part of the deliberative process represents a serious misreading and misapplication of existing case law.

The Court of Appeals' misconstruction is clearly evident if attention is focused on the "decision" which the Court of Appeals struggled to find in order to bring

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[6] 617 F.2d 854, 858 (D.C. Cir., 1981)

[7] 421 U.S. 168 (1975)

its holding within the scope of existing case law. That "decision" was said to be the determination of United States policy in the Middle East. Given that apparent finding the Court's conclusion that "the requested documents, in this case bear no indicia of finality . . . [T]hey originated in the Office of the Legal Adviser, who has no authority to make final decisions concerning United States policy in the Middle East"[8] is not surprising. However, in so doing, the Court of Appeals is attempting to mold the making of United States foreign policy into some type of adjudicatory process. This Court has never, nor has any previous lower court, sought to imbue an entire agency's or department's primary function with the protective hue of decision-making. If the determination of U.S. policy in the Middle East is a kind of adjudicatory process within the meaning of FOIA, the Department's policy-making is Latin America, Europe and other areas of the world must be similarly characterized. As a consequence, all documents prepared within the Department are "pre-decisional" and, hence, exempt from release. Such an interpretation would effectively render FOIA impotent, at least as far as the Department of State were concerned. Moreover, the Court of Appeals' interpretation constitutes a refusal to examine the actual functions the requested documents preformed within the Department of State.

The withheld documents are interpretations of publicly available facts, i.e., the Israeli victory in the 1967 war, and the consequences of that victory under international law. The interpretations are the working law of the Department. They are final and, by the

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[8] Slip opinion at p. 8. (Please see Exhibit A).

Department's admission, relied upon. In *Coastal States, supra,* the United States Court of Appeals for the District of Columbia Circuit found that memoranda of law prepared by the Department of Energy's legal staff which were interpretations of that department's regulations as they related to certain factual situations were outside the scope of Exemption Five. The Court noted that such legal memoranda "were not suggestions or recommendations as to what agency policy should be . . . nor are they suggested dispositions of a case . . . [and] are not one step of an established adjudicatory process, which would result in a formal opinion."[9] Those memoranda, as well as the documents which are the subject of this litigation, are not predecisional because no decision within an adjudicatory sense is to be made. The documents represent final legal memoranda and, as such, are not part of the deliberative process.

Brinton's position is further buttressed by the Court of Appeal's insistence that the unchanging nature of the documents for periods of six, eight or ten years is not evidence of their finality.[10] Instead, the Court of Appeals concludes that because the "policymakers" are free to follow the "advice" in the memoranda, the documents are not final. If, as discussed earlier, the making of foreign policy is distinguished from a government contracts case, then it becomes clear that the legal interpretations stand on their own. The Secretary of State does not overrule them or adopt them, but takes cognizance of their interpretations. It is not dissimilar to the situation found in *Mead Data Cent., Inc.* v. *U.S. Department of Air Force*[11] where the Judge Advocate

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[9] 617 F.2d 854, 868 (D.C. Cir., 1980).

[10] Slip Opinion at page 9. (Please see Exhibit A).

[11] 566 F.2d 242 (D.C. Cir., 1977).

General's opinion on certain copyright and FOIA questions as well as other legal memoranda were utilized as background by Air Force officials in contract negotiations. Those documents were determined, for the most part, to be outside the scope of Exemption Five. The continued vitality of the withheld documents after many years is clear evidence of the permanent quality of those interpretations and of their finality.

The deliberative process privilege has been determined to have a role to play in FOIA. Exemption Five does protect the release of documents which represent an interim step in the decision-making process. The interpretation given Exemption Five by the lower courts goes far beyond this measure of protection and should be reviewed by this Court.

The vulnerability of the Exemption Five claim of the Department might well have been apparent to the lower courts, particularly the District Court, had a full *de novo* review been made. Instead, the District Court consistently refused to make an *in camera* review of the requested documents or to permit discovery by Brinton and precipitously granted the Department's motion for summary judgment. As Rule 56 of the Federal Rules of Civil Procedure clearly provides, a successful motion for summary judgment requires a showing that there is no genuine issue as to any material fact. In this instance, no such showing was made and Brinton's many efforts to develop those material facts were rebuffed by the lower courts. Whatever the applicability of the deliberate process exemption, it required further evidentiary development than was permitted by the District Court. The Court of Appeals upheld this course of conduct as within the discretion of the District Court. This Court should take cognizance of this limited record in its review.

This Court should also take note, as set forth in the Statement of the Case, of the Department's extraordinary efforts to resist the release of the documents including Ambassador Atherton's reclassification of the documents in February - March, 1979. Brinton is unable to find any other instance of *reclassification* during the course of a FOIA proceeding.

Therefore, Brinton asks this Court to recognize that the lower courts have misinterpreted the breadth of Exemption Five of FOIA and applied the deliberative process privilege to documents which do not represent interim or intermediate decisions of the Department of State. Accordingly, the Writ of Certiorari should be granted, the judgment of the United States Court of Appeals for the District of Columbia Circuit reversed and the cause remanded with directions to the United States District Court for the District of Columbia for appropriate relief.

CONCLUSION

For the aforesaid reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court Of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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March 6, 1981

EXHIBITS

EXHIBIT A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2032

WILLIAM M. BRINTON, APPELLANT

v.

DEPARTMENT OF STATE, *et al.*, APPELLEES

Appeal from the United States District Court
for the District of Columbia Circuit

(Civil Action No. 78-0112)

Argued 9 June 1980

Decided 3 September 1980

James M. Sack for appellant.

JoAnn Dolan, Attorney, Department of Justice, with whom *Alice Daniel*, Assistant Attorney General, *Carl S. Rauh*, U.S. Attorney at the time the brief was filed, and *Leonard Schaitman*, Attorney, Department of Justice, were on the brief, for appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: TAMM, ROBINSON, and WILKEY, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: This appeal arises from the district court's denial of appellant William M. Brinton's Freedom of Information Act (FOIA) suit for State Department documents. Appellant requested legal opinions prepared for the Department of State by the Department's Office of the Legal Adviser, concerning United States policy on issues involving Israel and the West Bank, the Golan Heights, and the Gaza Strip. After the State Department released several requested documents or parts of documents to appellant, the district court found the remainder of the requested documents to be within Exemption 5 of the FOIA for inter- or intra-agency memoranda not available by law to a party. The court held the documents to be not available under Exemption 5 on grounds of attorney-client privilege, and also found them to be within the deliberative process protected by Exemption 5. The district court accordingly granted summary judgment to the Department. From this judgment Brinton now appeals.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1977 appellant filed a request with the State Department for opinions of the Office of the Legal Adviser concerning the legal status of territory occupied by Israel since June 1967. Among the documents requested by appellant were a Memorandum of Agreement between the United States and Israel dating from 1975 and any opinions concerning United Nations Resolution 242.[1]

The State Department found nine documents responsive to appellant's request and initially released one of

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[1] *See Brinton* v. *United States Dep't of State,* 476 F. Supp. 535, 537-38 (D.D.C. 1979).

them, withholding the others pursuant to FOIA Exemptions 1 and 5. Exemption 1 protects from FOIA disclosure those matters "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." [2]

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." [3]

In January 1978 appellant filed suit in United States District Court to compel disclosure of those documents withheld by the State Department. By Memorandum and Order dated 30 November 1978, from which no appeal was taken, the district court rejected the government's claim that appellant had failed to exhaust his administrative remedies. The court further held, however, that the Exemption 1 claim should be referred to the State Department's Council on Classification Policy to review the substantive and procedural validity of classification in light of recently enacted Executive Order No. 12,038.[4]

Upon review by the Council, the State Department released to appellant the requested Memorandum of Agreement between the governments of Israel and the United States, as well as portions of several other requested documents. The Department continued to claim Exemption 5 protection for all the remaining withheld documents and portions of documents, and continued to claim Exemption 1 coverage for the bulk of the docu-

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[2] 5 U.S.C. § 552(b)(1) (1976).

[3] 5 U.S.C. § 552(b)(5) (1976).

[4] *See Brinton* v. *United States Dep't of State*, No. 78-0112, slip op. at 4-5 (D.D.C. 30 Nov. 1978), *reprinted in* Joint Appendix (J.A.) at 73, 76-77.

ments. The Department submitted several affidavits to the district court to support these claims.

On 12 June 1979 the district court ruled on the Government's motion for summary judgment as to its FOIA exemption claims. The court did not decide the applicability of Exemption 1, but found instead that all the withheld documents were within Exemption 5. As its primary basis for withholding the remaining documents under Exemption 5, the court found all portions of the documents to be within the attorney-client privilege. The court found the documents to be the product of an attorney-client relationship between the Secretary of State and the Legal Adviser, and further found the documents to be maintained as confidential between attorney and client, citing this court's opinion in *Mead Data Central, Inc.* v. *United States Department of Air Force.*[5] As an additional ground for the application of Exemption 5, the court found the documents to be predecisional and deliberative working papers of the Department of State, and thus within the deliberative process basis for application of Exemption 5.

In granting summary judgment to the Government, the district court determined the State Department's affidavits to be sufficiently clear and detailed to establish the applicability of Exemption 5. The court found no allegations or evidence of bad faith on the part of the Department. For these reasons the court granted summary judgment without acceding to appellant's request for an *in camera* inspection of the documents.[6]

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[5] 566 F.2d 242 (D.C. Cir. 1977).

[6] *See Brinton* v. *United States Dep't of State*, 476 F. Supp. 535, 538-43 (D.D.C. 1979).

II. ANALYSIS

Both congressional intent and judicial precedent establish the attorney-client privilege as a ground for applying Exemption 5.[7] Following this circuit's *Mead Data* opinion, the district court in this case held that the attorney-client privilege applies only when information is the product of an attorney-client relationship and is maintained as confidential between attorney and client.[8]

There is an additional limitation on the attorney-client privilege, however, for those communications that originate from the lawyer rather than from the client. *Mead Data* stated that when the attorney communicates to the client, the privilege applies only if the communication "is based on confidential information provided by the client." [9]

This limitation applies generally to attorney-client privilege cases whether or not in the context of the FOIA. For example, the Eighth Circuit has limited the privilege to communications from the attorney that are "related to the confidence" from the client.[10] A district court decision applied the privilege to a document from counsel that was "based, in part at least, upon a confidential communication from an officer of defendant to counsel." [11]

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[7] *See NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975); *Mead Data Cent., Inc.* v. *United States Dep't of Air Force*, 566 F.2d 242, 252-53 (D.C. Cir. 1977); S. REP. No. 813, 89th Cong., 1st Sess. 2 (1965).

[8] *Brinton* v. *United States Dep't of State*, 476 F. Supp. 535, 539-40 (D.D.C. 1979).

[9] *Mead Data Cent., Inc.* v. *United States Dep't of Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977).

[10] *Schwimmer* v. *United States*, 232 F.2d 855, 863 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956).

[11] *8 In 1 Pet Prods., Inc.* v. *Swift & Co.*, 218 F. Supp. 253, 253 (S.D.N.Y. 1963).

Whatever the precise formulation of this standard, it is clear that when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged.[12] To allow the contrary rule would permit agencies to insulate facts from FOIA disclosure by simply routing them through lawyers in the agency and invoking the attorney-client privilege.

In the present case the district court did not make any finding as to whether the withheld documents satisfied this limitation on the privilege for communications from attorney to client. The opinion contains no finding that the communications are based on or related to confidences from the client, nor is there a finding that the documents are not based on facts acquired from other persons or sources. Further, the answer to these questions does not appear clearly on the record before us. We therefore cannot affirm the district court's judgment on the basis of the attorney-client privilege.

The district court, however, stated a second rationale for applying Exemption 5 when it exempted the names of attorneys who authorized the requested documents. The court exempted these names on the ground that the documents in question were predecisional and deliberative.[13] If these agency records are indeed deliberative, it is appropriate to apply Exemption 5 to the documents themselves, as well as to the names of their authors.

The deliberative process ground for Exemption 5 protects the decision-making process of an agency,[14] in the

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[12] *See Tutson* v. *Holland*, 50 F.2d 338, 340 (D.C. Cir.), *cert. denied*, 284 U.S. 632 (1931); *Congoleum Indus., Inc.* v. *GAF Corp.*, 49 F.R.D. 82, 85-86 (E.D. Pa. 1969), *aff'd mem.*, 478 F.2d 1398 (3d Cir. 1973); *United States* v. *United States Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950).

[13] *See Brinton* v. *United States Dep't of State*, 476 F. Supp. 535, 542-43 (D.D.C. 1979).

[14] *See NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).

sense of communications related to the agency's deliberative process preceding adoption and promulgation of agency policy.[15] The Senate Report on the FOIA observed that "it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny." [16]

The documents at issue in this case are all in the nature of legal advice to the Secretary of State.[17] In his request appellant specifically directed his inquiry to "legal opinions prepared for the Secretaries of State." [18] There can be no doubt that such legal advice, given in the form of intra-agency memoranda prior to any agency decision on the issues involved, fits exactly within the deliberative process rationale for Exemption 5. That the requested documents contain opinion rather than mere fact is undisputed; appellant does not allege the existence of factual material, not intertwined with opinion and advice, which would be unprotected by Exemption 5.[19]

Appellant contests the application of the deliberative process exemption primarily by claiming that the requested documents are "final opinions" of the Department of State. Exemption 5 does not protect final statements of policy or final actions of agencies, which have

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[15] *See Jordan* v. *United States Dep't of Justice*, 591 F.2d 753, 772-74 (D.C. Cir. 1978) (*en banc*); *Montrose Chem. Corp.* v. *Train*, 491 F.2d 63, 66-70 (D.C. Cir. 1974).

[16] S. REP. No. 813, 89th Cong., 1st Sess. 9 (1965).

[17] *See Brinton* v. *United States Dep't of State*, 476 F. Supp. 535, 540 (D.D.C. 1979).

[18] *Id.* at 537 (quoting from appellant's FOIA request letter dated 4 Oct. 1977).

[19] *See, e.g., EPA* v. *Mink*, 410 U.S. 73, 91 (1973); *Ryan* v. *Department of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980).

the force of law or which explain actions the agency has already taken; nor does it protect communications that promulgate or implement an established policy of an agency.[20] The rationale underlying the "final opinion" exception to the deliberative process rule is to prevent agencies from developing a body of "secret law" veiled by the privilege of Exemption 5.[21]

The requested documents in this case, however, bear no indicia of finality. They originated in the Office of the Legal Adviser, who has no authority to make final decisions concerning United States policy in the Middle East. Instead, his role is to give advice to those in the State Department who do make the policy decisions. This flow of advisory material is exactly opposite to the paradigm of "final opinions," which typically flow from a superior with policy-making authority to a subordinate who carries out the policy.[22]

Advisory materials of this sort can become final opinions only if the agency expressly adopts or incorporates them as working law.[23] Although appellant alleges that advisory material from some of the requested documents was used extensively in a later State Department memorandum, there is no indication that any material was expressly adopted or incorporated by reference in a final opinion of the Department.[24]

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[20] *See NLRB* v. *Sears, Roebuck & Co.*, 521 U.S. 132, 153-54 (1975); *Ryan* v. *Department of Justice*, 617 F.2d 781, 790-91 (D.C. Cir. 1980); *Jordan* v. *United States Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (*en banc*).

[21] *See Coastal States Gas Corp.* v. *Department of Energy*, 617 F.2d 854, 867-68 (D.C. Cir. 1980).

[22] *See, e.g., id.* at 868.

[23] *See NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975).

[24] *See Brinton* v. *United States Dep't of State*, 476 F. Supp. 535, 541 n.5 (D.D.C. 1979).

At oral argument appellant called attention to the age of these legal opinions—a period of several years—as an indication of their "finality." But the age of the opinion has nothing to do with whether it has been adopted as effective agency working law; the State Department could surely within its discretion retain the opinions of the Legal Adviser for whatever value they may have for an indefinite period of time. As occasions arise, State Department policy-makers and perhaps other Executive officials may decide whether to follow the advice on file in the memoranda. The important criterion is whether those who consult the opinions have discretion to follow the opinions or not, based on their persuasive value rather than their character as working law of the Department. By this criterion the documents clearly qualify for protection under FOIA Exemption 5.

We therefore conclude that the district court correctly invoked the deliberate process ground for the application of Exemption 5, and we affirm the grant of summary judgment on that basis rather than on the basis of attorney-client privilege. Our discussion of Exemption 5 illustrates a point earlier observed by this court in the *Mead Data* case, concerning the overlap of the attorney-client privilege ground with the deliberative process ground of Exemption 5.[25] The attorney-client privilege primarily applies to *facts* divulged by client to attorney, but its scope also includes opinions from attorney to client based on those facts. The deliberative process, on the other hand, applies to inter- or intra-agency exchanges of *opinions*, but its scope is broad enough to protect those facts intertwined with the opinions or tending to reveal the deliberative process.[26] In any FOIA

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[25] *Mead Data Cent., Inc.* v. *United States Dep't of Air Force*, 566 F.2d at 254 n.28.

[26] *See, e.g., Ryan* v. *Department of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980); *Montrose Chem. Corp.* v. *Train*, 491 F.2d 63, 66-70 (D.C. Cir. 1974).

case involving advisory memoranda from agency lawyers to agency decision-makers, either or both of these grounds of exemption may apply, depending on the circumstances.

In the case now before us it is clear, based on the record, that the deliberative process ground of Exemption 5 covers the requested documents. Further development of the record might or might not show that the attorney-client privilege applies as well; that step is not now necessary. Because the Department affidavits made a detailed showing of the applicability of the deliberative process ground of Exemption 5, and since there is no contradictory evidence or evidence of Department bad faith, the district court was entirely correct in granting summary judgment without conducting an *in camera* inspection of the documents.[27]

The judgment is therefore

Affirmed.

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[27] *See, e.g., Hayden* v. *NSA*, 608 F.2d 1381, 1384-88 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 2156 (1980); *Founding Church of Scientology* v. *NSA*, 610 F.2d 824, 836 (D.C. Cir. 1979).

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Action No. 78-0112

No. 79-2032

WILLIAM M. BRINTON, an individual, *Appellant*

v.

DEPARTMENT OF STATE, an agency of the United States Government, *et al.*

Before: Tamm, Robinson and Wilkey, *Circuit Judges*

Order

(Filed December 9, 1980)

On consideration of appellant's petition for rehearing, it is

ORDERED, by the Court, that appellant's aforesaid petition is denied.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Action No. 78-0112

No. 79-2032

WILLIAM M. BRINTON, an individual, *Appellant*

v.

DEPARTMENT OF STATE, an agency of the United States Government, *et al.*

Before: Wright, *Chief Judge*; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, *Circuit Judges*

Order

(Filed December 9, 1980)

The suggestion for rehearing *en banc* filed by appellant having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, *en banc,* that appellant's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

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EXHIBIT D

The Freedom Of Information Act

5 U.S.C. §552 — Public Information; Agency Rules, Opinions, Orders, Records, And Proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this

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paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each Index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that

affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) (A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a

case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the

withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the correotive action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse deteterminations; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the request records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to

complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(b) This section does not apply to matters that are—

(2) related solely to the internal personnel rules and practices of an agency;

(b) This section does not apply to matters that are—

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that each statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(b) This section does not apply to matters that are—

(4) trade secrets and commercial financial information obtained from a person and privileged or confidential;

(b) This section does not apply to matters that are—

(5) inter-agency or intra-agency memorandum or letters which would not be available by law to a party other than an agency in litigation with the agency;

(b) This section does not apply to matters that are—

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(b) This section does not apply to matters that are—

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(b) This section does not apply to matters that are—

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(b) This section does not apply to matters that are—

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disclipinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G).

Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

[P.L. 89-554, 9-6-66, 80 Stat. 383. Last amended by P.L. 94-409, §5(b), 9-13-76, 90 Stat. 1247.]

EXHIBIT E

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA.

WILLIAM M. BRINTON, *Plaintiff,*

v.

UNITED STATES DEPARTMENT OF STATE *et al., Defendants.*

Civ. A. No. 78-0112.

June 12, 1979.

As Amended Sept. 21, 1979.

James M. Sack, Washington, D.C., for plaintiff.

Karen I. Ward, Asst. U.S. Atty., JoAnn J. Dolan, U.S. Department of Justice, Washington, D.C., for defendants.

MEMORANDUM

OBERDORFER, *District Judge.*

I. BACKGROUND

This case arises under the Freedom of Information Act (FOIA).[1] By letter dated October 4, 1977, plaintiff requested from defendant:

> 1. All opinions written by the Counselor or [Legal Advisor] to the Department of State . . . concerning the legal status of the West Bank, the Golan Heights and the Gaza Strip since June, 1967.
>
> 2. Any legal opinion of the Counselor . . . tending to support the view that the West Bank, the Golan Heights or the Gaza Strip is "occupied territory" under principles of public international law; or is not "occupied territory". . . .
>
> 3. The Memorandum of Understanding between the United States and Israel in 1975 and any legal opinion of the Counselor dealing with its effect. . . .

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[1] 5 U.S.C. §552 (1976).

4. Any legal opinion of the Counselor dealing with United Nations Resolution 242. . . .

The final paragraph of plaintiff's letter stated:

"To avoid any misunderstanding, my request relates to legal opinions prepared for the Secretaries of State. . . ."

In response to plaintiff's request, the Freedom of Information Act Staff of the Department of State caused the files of the Foreign Affairs Document and Reference Center and the files of the Assistant Legal Adviser for Near Eastern and South Asian Affairs to be searched for appropriate documents. Affidavit of Barbara Ennis, Director, Freedom of Information Staff, May 8, 1978 ("Ennis affidavit") at 2. As a result of the search, defendants determined that nine documents were responsive to plaintiff's FOIA request, broadly construed. One document (document 6) was released in its entirety to plaintiff on January 10, 1978. Ennis affidavit, exhibit H. The remaining eight documents were withheld in whole or in part pursuant to exemptions (b)(1)[2] and (5)[3] of FOIA.

Document No. 1 is a Memorandum of Agreement between the Governments of Israel and the United States.

Document No. 2 is a four-page memorandum, entitled "Political and Legal History of the West Bank and Jerusalem."

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[2] Exemption (b)(1) provides that FOIA does not apply to matters that are

"(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order. . . ."

[3] Exemption (b)(5) provides that FOIA does not apply to matters that are

"inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. . . ."

Document No. 3 is a four-page memorandum, entitled "The Legal Status of the Israeli Presence in Jerusalem and the West Bank."

Document No. 3a is a five-page memorandum entitled "Withdrawal of Israeli Forces from Occupied Territories," discussing the application of general principles of the law of war to Israel's occupation of territories during the 1967 War.

Document No. 4 is a four-page memorandum, entitled "Boundaries," discussing legal considerations governing the status of Israel's territorial boundaries.

Document No. 5 is a six-page memorandum, entitled "Jerusalem," discussing the competing Arab and Israeli claims to Jerusalem.

Document No. 7 is a seven-page memorandum, entitled "Legal Status of Israel's Boundaries and of the West Bank," discussing the legal status of Israel's territorial boundaries and the legal merits of Jordan's claims to the West Bank.

Document No. 8 is a 26-page memorandum, entitled "The Status Under International Law of Israeli Settlements Located in Territories Occupied by Israel During the 1967 War," discussing the rules of International law governing belligerent occupation with specific application to the legal status of Israeli civilian and military settlements in occupied territory. *See generally* Affidavit of Ambassador Alfred Atherton, Jr., March 20, 1979, ("Atherton affidavit"), attached as Appendix A to this Memorandum, at 7-15.

On January 23, 1978, plaintiff filed this lawsuit to enjoin defendants from withholding those portions of the eight documents identified as responsive to his FOIA request. By Memorandum and Order of November 30, 1978, the Court ruled that it had jurisdiction and denied defendants' motion to dismiss for failure to exhaust administrative remedies. Nevertheless, the Court directed defendants to submit the withheld documents to the Council on Classification Policy of the Department of State, the body with responsibility for

deciding appeals for denials of FOIA requests, for review in light of Executive Order No. 12065, the Executive Order on classification which superseded Executive Order 11652 on December 1, 1978. Memorandum and Order November 30, 1978.

In response to the Court's Order, the eight withheld documents were reviewed by the Legal Adviser's office, the Council on Classification Policy and Ambassador at Large, Alfred Atherton, Jr. As a result of that review, the following additional information was released to plaintiff: Document No. 1, Memorandum of Agreement between the Governments of Israel and the United States, was released in its entirety. Second Affidavit of William Blair, Jr., Senior Deputy Assistant Secretary for the Bureau of Public Affairs of the Department of State, March 2, 1979 ("Second Blair affidavit"), exhibit A. The text of Document No. 2, a footnote quoting a Security Council resolution in document No. 5 and various portions of documents Nos. 7 and 8 were also released to plaintiff. Second Blair affidavit, exhibit B and attachments. During the course of the review, Ambassador Atherton, with the approval of the Council on Classification Policy, reclassified as CONFIDENTIAL certain portions of document No. 3, all of document No. 4, all of formerly declassified portions of documents Nos. 3a, 5 and 7, and all but one formerly declassified portion of document No. 8. Atherton affidavit at 4. Defendants have submitted a revised index reflecting these changes and a detailed affidavit by Ambassador Atherton, indicating the reasons for them. The Atherton affidavit states, among other things:

> It is now the Department of State's considered opinion that the release of any portion of the documents that remain withheld . . . could reasonably be expected to cause identifiable damage to the national security. It has become apparent within the context of the peace negotiations that disclosure of Department legal memoranda concerning the Middle East conflict can have significant adverse impact on the course and conduct of

> those negotiations. . . . The same considerations will continue to apply following signature and ratification of the Treaty of Peace between Israel and Egypt since this agreement, as President Carter has said, is part of a larger, comprehensive peace.

Atherton affidavit at 3-4.

[1] Issue is joined by defendants' motion for summary judgment. In addition to his opposition to defendants' motion for summary judgment plaintiff has moved to make discovery pursuant to 56(f) Fed.R. Civ.P. Plaintiff's Motion to make discovery, February 26, 1979. In light of defendants' good faith, relatively detailed and nonconclusory affidavits submitted in support of their motion for summary judgment, the Court chooses, in its discretion, to forego discovery and to award summary judgment on the basis of defendants' submissions. *See Goland* v. *CIA,* 197 U.S.App. D.C. _____ at _____, 607 F.2d 339 at 352 (1978); *see also Exxon* v. *F. T. C.,* 466 F.Supp. 1088 at 1092-1093 (D.D.C.1978), and cases cited therein. Accordingly, plaintiff's motion to make discovery pursuant to 56(f) Fed.R.Civ.P. will be denied.

Plaintiff has also "urged" the Court to "exercise its right to make an *in camera* review" of the withheld documents, without any indication as to the purpose that would be served by such review. Plaintiff's Reply In Opposition to Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment, May 22, 1978 ("Plaintiff's Opposition") at 15. The power of a district court to order *in camera* review of documents in a FOIA case is discretionary. *Ray* v. *Turner,* 190 U.S.App.D.C. 290, 298, 587 F.2d 1187, 1195 (1978). That power should not be used routinely "on the theory that 'it can't hurt'", but should be reserved for situations where "the district judge believes that *in camera* inspection is needed in order to make a responsible *de novo* determination on the claims of exemption." *Id.* In the present case, there are no allegations of bad faith and defendants' descriptions of the withheld documents and the proffered justification for their

exemption are sufficiently clear and detailed so as to make *in camera* review unnecessary. *See Mead Data Cent., Inc.* v. *Department of Air Force,* 184 U.S.App.D.C. 350, 370, 566 F.2d 242, 262 (1975); *Bristol-Myers Company* v. *F. T. C.,* 194 U.S.App.D.C. 99 at 110, 598 F.2d 18 at 29 n. 23 (1978); *Mervin* v. *F. T. C.,* 192 U.S.App.D.C. 212, n. 2, 591 F.2d 821, 826 n. 2 (1978).

II. Findings of Fact and Conclusions of Law

In a FOIA case, as in any other case, summary judgment may be granted only if the moving party establishes that

> "'no substantial and material facts are in dispute and that he is entitled to judgment as a matter of law.'"

Founding Church of Scientology of Washington, D.C. v. *National Security Agency,* slip op. at 25 (D.C.Cir. May 15, 1979). Accordingly, in order to prevail on its motion for summary judgment in a FOIA suit an agency defendant

> " 'must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements.' "

Founding Church of Scientology, supra, slip op. at 26.

In the present case, neither plaintiff nor the showing of defendants raises or reveals any issue of inadequacy or bad faith in the search for documents responsive to plaintiff's FOIA request.[4] Defendants' Ennis affidavit indicates, and plaintiff does not dispute, that the appropriate files of the Department of State were searched for responsive documents. Moreover, defendants' submissions indicate that plaintiff's request was construed "broadly" and in a non-technical

[4] Plaintiff previously disputed the adequacy of defendants' search on the basis of a supposed document not identified by defendants. Plaintiff later abandoned this claim, stating that he was prepared to stipulate that no such document exists. Plaintiff's Memorandum in Opposition to Defendant's Motion for a Protective Order, March 31, 1978, at 5.

manner. *See* Ennis affidavit, exhibits B and F. There is no substantial dispute that the original nine documents identified by defendants are all the documents that fairly respond to plaintiff's FOIA request. The remaining questions therefore concern whether those portions of identified documents not produced have been properly withheld pursuant to the exemptions contained in FOIA.

A. Attorney-Client Privilege

Defendants primarily rely on the attorney-client privilege for the continued withholding of each portion of the remaining seven documents at issue: documents 2, 3, 3a, 4, 5, 7 and 8. Third Supplemental Memorandum in Support of Defendants' Motion for Summary Judgment, March 20, 1979, at 20. The attorney-client privilege may provide a basis for withholding information pursuant to exemption (b)(5) when the information consists of

> "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice."

Mead Data Cent., Inc. v. *Department of Air Force,* 184 U.S.App.D.C. 350, 360, 566 F.2d 242, 252 (1977). Accordingly, in order to qualify for a (b)(5) exemption pursuant to the attorney-client privilege, withheld information must (1) be the product of an attorney-client relationship and (2) be maintained as confidential between the attorney and his client; if the information has been or is later shared with third parties, the privilege does not apply. *Mead Data, supra,* 184 U.S.App.D.C. at 361, 566 F.2d at 253.

In the present case, defendants have attested, by affidavits of Lee R. Marks, Deputy Legal Adviser of the Department of State, May 8, 1978 ("Marks affidavit") and Ambassador Atherton that each of the withheld documents is an internal memorandum of the Department of State, prepared by attorneys for the use of their clients in the Department, the purpose of which is to offer legal advice

relating to Middle East diplomacy. Atherton affidavit at 5-6; *see also* Marks affidavit at 3-4. As the Atherton affidavit states:

> "The legal documents at issue in this case have been prepared by the Department's attorneys for me and for other officials with responsibility for handling Middle East Diplomacy, or in connection with the attorneys' advice to and representation of senior Department clients in furtherance of their official responsibilities."

Atherton affidavit at 5. The Court's *de novo* examination of the titles and descriptions of the documents concerned, in the context of plaintiff's FOIA request for "legal opinions" prepared by the Legal Adviser, corroborates that these documents are the product of an attorney-client relationship.

With respect to the confidentiality of the information withheld, plaintiff takes the position that defendants have "waived" any claims of privilege or confidentiality by virtue of the Secretary of State's

> "repeated public statements regarding the legal status of the Israeli settlements in the Sinai and elsewhere."

Plaintiff's Amendment to Complaint, February 24, 2978, at XIII. Plaintiff makes the same point with respect to legal advice he asserts was incorporated in a published letter of the Legal Adviser, Herbert J. Hansell, to the Chairman of the House Subcommittees on International Organization and on Europe and the Middle East, dated April 21, 1978. Plaintiff's Opposition, Appendix A. Plaintiff claims that

> "the Hansell Memorandum purports to provide a legal analysis in support of the Defendant's (sic) political position and, in so doing, implicitly waives Defendant's prior claims of B(1) and B(5) Exemptions."

Plaintiff's Opposition at 11. Public statements made by the Secretary of State or other officials in reliance upon (or contrary to) legal advice provided through legal advisors obviously do not "waive" the attorney-client privilege or

make the privilege inapplicable. The Hansell Memorandum does not cite or refer to any of the documents withheld by defendants. The Hansell Memorandum cites only publicly available sources in support of the positions taken therein. Plaintiff does not allege that defendants have made any of the withheld documents or their contents available to "non-client" third parties, nor is there any evidence to this effect.

Furthermore, the Atherton affidavit states that officials in the Department of State require and rely on "continued confidentiality" of communications and advice received from the Legal Adviser's Office. Atherton affidavit at 6. The fair and unchallenged inference of this representation is that the documents have been treated as confidential within the Department of State and have not been shared with non-client third parties. *See* Reply to Plaintiff's Memorandum in Opposition. April 20, 1979 at 3. Moreover, in the present case, all but a few portions of the documents withheld have been and are currently classified as CONFIDENTIAL, thereby further confirming the restricted and confidential nature of the majority of the documents. Document Disposition Index, Appendix A, Third Supplemental Memorandum in support of defendants' motion for summary judgment, March 20, 1979; Atherton affidavit at 2-18. As the Atherton affidavit states:

> The ability of senior Department officers to obtain the needed internal assessments of legally relevant history, guidance on applicable legal principles, advice on the formulation, phrasing, and justification of positions, and counsel related to operational decisions, depends in large part on their ability to rely on continued confidentiality and on an understanding that this will remain an internal process to the extent deemed necessary

Atherton affidavit at 6.

Accordingly, for all of the reasons mentioned above, the Court concludes that the withheld documents, including those portions not currently classified as CONFIDENTIAL, fall within the attorney-client privilege and therefore within exemption

(b)(5).[5] *See Mead Data, supra,* 184 U.S.App.D.C. at n. 24, 566 F.2d at n.24.

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[5] Plaintiff takes the position that, notwithstanding that all portions of the documents withheld by defendants may be entitled to exemption under (b)(5) of FOIA, this exemption has been lost since the documents

> "were used extensively in the preparation of the Hansell Memorandum and were incorporated therein to a degree which constitutes adoption . . . [The Hansell Memorandum] represents the public disclosure of a final agency position."

Plaintiff's Opposition at 19-12. In support of his position plaintiff relies on the Supreme Court's decision in *N.L.R.B.* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975). That case held that if an agency

> "chooses *expressly* to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it [is covered by] some exemption other than Exemption 5." (emphasis in original)

421 U.S. at 161, 95 S.Ct. at 1521-1522.

Plaintiff has alleged, however, only that the documents in question "were used extensively" in the preparation of the Hansell Memorandum and were "incorporated" therein "to a degree which constitutes adoption". Plaintiff does not allege that the documents were "expressly" adopted or incorporated by reference in the Hansell Memorandum, for example, by being " 'publically cited by an agency as the role basis for agency action' " or "formally incorporated as part of a final order." *Schwartz* v. *Internal Revenue Service,* 167 U.S.App.D.C. 301, 303-304, 511 F.2d 1303, 1305-1306 (1975). Furthermore, inspection of the Hansell Memorandum reveals that it neither expressly adopts any of the withheld documents nor incorporates any of them by reference. Neither plaintiff's allegations nor evidence in the record provides any foundation for the conclusion that the documents withheld have been "expressly" adopted or incorporated by reference in a final opinion.

Moreover, although the parties do not address this point, the Supreme Court in *N.L.R.B.* v. *Sears, Roebuck & Co.* was concerned with the "interplay of exemption 5 with the affirmative

B. Segregability

Because the focus of FOIA is "information, not documents," an agency "cannot justify withholding an entire document simply by showing that it contains some exempt material." *Mead Data, supra,* 184 U.S.App.D.C. at 368, 566 F.2d at 260. The agency "must provide a reasonable segregation as to the portions of the document that are involved in each of its claims for exemption." *Ray* v. *Turner,* 190 U.S.App.D.C. 290, 587 F.2d 1187 (1978). The burden of satisfying this requirement is lighter with respect to some privilege claims than others, however. In the case of the attorney-client privilege, our Court of Appeals has noted that

> "the attorney-client privilege permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts, while the deliberative process . . . does not permit the nondisclosure of underlying facts unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process."

Mead Data, supra, 184 U.S.App.D.C. at n. 28, 566 F.2d at n. 28. *See also Mervin* v. *F.T.C.,* 192 U.S.App.D.C. 212, 217, 591 F.2d 821, 826 (1978).

In the present case, the Atherton affidavit and defendants' Document Disposition Index describe the documents withheld in considerable detail, thereby enabling the Court to engage in meaningful, *de novo* review of defendants' claim that

> "No segregable portion [of any document] may reasonably or practicably be released. . . ."

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provisions of FOIA", in particular, 5 U.S.C. §552(a)(2)(A), requiring an agency to make available for inspection and copying " 'final opinions . . . made in the adjudication of cases.' " *Bristol Myers Company* v. *F.T.C.,* 598 F.2d 18 at 27-28; *and see Renegotiation Board* v. *Grumman Aircraft,* 421 U.S. 168 n. 21, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975). The Hansell Memorandum, of course, is not a final opinion "made in the adjudication" of any case, and the relevance of *N.L.R.B.* v. *Sears, Roebuck & Co.* may therefore be open to question.

Atherton affidavit at 8. For example, document No. 3a is described in the Atherton affidavit as a five-page legal memorandum dated January 16, 1974, entitled "Withdrawal of Israeli Forces from Occupied Territories." It discusses the general principles of the law of war and the use of force as they apply to the June, 1967 Arab-Israeli War, including the legality of Israel's occupation of territories during the 1967 War. The document is divided into three segments: "Issue" (page 1), "Arguments" (pages 2-5) and "Comment" (page 5). The "Issue" section is described as setting forth the relevant provisions of the law in such a way as to reveal the legal opinion of the author as to the basic premises and principles that govern the subject of the memorandum. The "Arguments" section applies the author's choice and interpretation of the law to the topic of discussion and also analyzes the conflicting interpretations of the parties involved. The "Comment" section sets forth in two sentences the personal opinions and predictions of the author. Atherton affidavit at 9-10.

This brief but informative sketch of document No. 3a is representative of defendants' descriptions of each withheld document, particularly the descriptions contained in the Atherton affidavit. These descriptions, in the context of the creation of the documents, their sensitive subject matter and generally classified status, corroborate Ambassador Atherton's sworn representation that there are no non-exempt, reasonably segregable portions of any withheld document and that release of any reasonably segregable portion of any withheld document would disclose information, factual or advisory, protected by the attorney-client privilege. Accordingly, the Court concludes that defendants are entitled to summary judgment on the issue of segregability. *See Mead Data, supra,* 184 U.S.App.D.C. 367-370 at n. 28, 566 F.2d 259-262; *see also Mervin, id.*

C. Names of Attorneys

Defendants have withheld the names of the attorneys who prepared each of the identified documents. In the case of document No. 2, the name of the preparing attorney is the only portion of the document not released to plaintiff. Atherton affidavit at 7; Document Disposition Index, document # 2. Although defendants have claimed the (b)(5) exemption to justify this non-disclosure, the attorney-client privilege does not suggest itself as the most appropriate basis for an exemption. Defendants have cited no cases in which the name of a government attorney has been specifically held exempt pursuant to the attorney-client privilege.

The foundation for defendants' refusal to divulge the names of the attorneys who prepared the legal memoranda at issue here rests on an appreciation of the fact that disclosure of these lawyers' identities

"in association with [their] internal advice could inhibit the candor of agency staff in the future."

Atherton affidavit at 7. The interest of the Department of State in candid discussion in the course of formulating foreign policy is protected by the deliberative process privilege. That privilege

> "attaches to inter- and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy."

Jordan v. *United States Dept. of Justice,* 192 U.S.App.D.C. 144, 163, 591 F.2d 753, 772 (1978). In this case the documents at issue are part of the formulation of United States foreign policy in the Middle East. *See generally* Atherton affidavit. The documents are "predecisional" and "deliberative" in the sense that they are part of the working papers of the Department of State in its ongoing negotiations in the Middle East. *See Jordan, supra,* 192 U.S.App.D.C. at 165, 591 F.2d at 774; compare Mead Data, supra, 184 U.S.App.D.C. at 365, 566 F.2d at 257. Under these circumstances disclosure of the names of the attorneys authoring the documents could

subject them to inhibiting public pressures. Even the threat of such publicity could impair the deliberative process within the Department of State. Accordingly, the names of the attorneys who authored the documents in question are properly withheld pursuant to the deliberative process privilege and exemption (b)(5). *See Montrose Chemical Corp.* v. *Train,* 160 U.S.App.D.C. 270, 275-278, 491 F.2d 63, 68-71 (1974); *Mead Data, supra,* 184 U.S.App.D.C. at 364, 566 F.2d at 256.

D. Conclusion

For all of the above reasons, defendants are entitled to summary judgment. An appropriate Order accompanies this Memorandum.

No. 80-1512

MAY 8 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM M. BRINTON, PETITIONER

v.

DEPARTMENT OF STATE AND ALEXANDER M. HAIG, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether confidential legal memoranda prepared by attorneys in the Office of the Legal Adviser of the Department of State in order to advise the Secretary of State concerning the legal status, under international law, of the West Bank, the Golan Heights, and the Gaza Strip, are protected from mandatory disclosure by Exemption 5 of the Freedom of Information Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 636 F. 2d 600. The opinion of the district court (Pet. App. 25a-38a) is reported at 476 F. Supp. 535.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1980 (Pet. App. 1a), and a petition for rehearing was denied on December 9, 1980 (Pet. App. 11a, 13a). The petition for a writ of certiorari was filed on March 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On October 4, 1977, petitioner filed a request, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, with the Department of State, seeking copies of the 1975 Memorandum of Understanding between the United

States and Israel and copies of legal opinions of the Department's Legal Adviser concerning the legal status, under international law, of the West Bank, the Golan Heights, and the Gaza Strip during the period since June 1967 (Pet. App. 2a, 25a-26a). The Department found nine documents that came within this request; it released one and withheld the remaining eight on the basis of Exemptions 1 and 5 of the FOIA, 5 U.S.C. 552(b)(1) and (5) (Pet. App. 2a-3a).[1]

In January 1978, petitioner filed this FOIA suit in the United States District Court for the District of Columbia to compel production of the withheld documents. The district court rejected the government's argument that petitioner had failed to exhaust administrative remedies, but it nonetheless referred the Exemption 1 claims to the State Department's Council on Classification Policy for review in light of a recently issued executive order on document classification (Pet. App. 3a). Following this review, the Department released the 1975 Memorandum of Understanding and portions of several of the other documents in issue; it reasserted an Exemption 5 claim as to all of the portions still withheld, including the names of the authors of the memoranda, and an Exemption 1 claim for some of the withheld information (*id.* at 3a-4a, 28a).

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[1] 5 U.S.C. 552(b)(1) and (5) exempt from FOIA disclosure records that are:

> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
>
> * * * * *
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

In June 1979, the district court entered summary judgment in favor of the government on the basis of its Exemption 5 claims. In particular, the court found that the memoranda, as confidential legal advice concerning Middle East diplomacy prepared by attorneys in the Legal Adviser's office, came within the attorney-client privilege (Pet. App. 31a-34a), a privilege incorporated in Exemption 5, and that there were no reasonably segregable non-exempt portions (*id.* at 35a-36a). The court also held that the memoranda constituted " 'predecisional' " and " 'deliberative' " documents insofar as they were "working papers of the Department of State in its ongoing negotiations in the Middle East," and it concluded that the names of the attorney authors of the memoranda are within Exemption 5 because their disclosure would "impair the deliberative process within the Department of State" (*id.* at 37a-38a). Because the Department's affidavits describing the documents were sufficiently detailed and there were no allegations of bad faith, the district court found it unnecessary to conduct an in camera review in determining the exempt status of the documents (*id.* at 29a-30a).

2. The court of appeals affirmed the district court's ultimate conclusion that the documents were protected from mandatory disclosure by Exemption 5 of the FOIA, but it did not rest its decision on the attorney-client privilege. Rather, the court of appeals noted that "[t]he documents at issue in this case are all in the nature of legal advice to the Secretary of State," and it held that "[t]here can be no doubt that such legal advice, given in the form of intra-agency memoranda prior to any agency decision on the issues involved, fits exactly within the deliberative process rationale for Exemption 5" (Pet. App. 7a; footnote omitted).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other

court of appeals. Review by this Court is accordingly unwarranted.

Petitioner essentially contends that the documents at issue in this case are not predecisional deliberative memoranda within the protection of Exemption 5 because the making of foreign policy cannot properly be equated with an "adjudicatory process" (Pet. 8) and because "no decision within an adjudicatory sense is to be made" (Pet. 9). Petitioner suggests that, for this reason, Exemption 5 does not encompass confidential advice to State Department officials responsible for making foreign policy decisions. This contention is contrary to this Court's descriptions of Exemption 5 as applying to "materials reflecting deliberative or policy-making processes" (*EPA* v. *Mink*, 410 U.S. 73, 89 (1973)) and to "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated' " (*NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975), quoting *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966)). No court has ever held that the exemption is limited to memoranda generated in the course of an adjudicatory process. The district court thus was correct in asserting (Pet. App. 37a) that "[t]he interest of the Department of State in candid discussion in the course of formulating foreign policy is protected by the deliberative process privilege." Where, as here, the memoranda at issue are drafted for the use of State Department officials in the policy-making process and "discuss sensitive and sometimes highly emotional issues which evoke strong reactions from the parties to the Middle East dispute" (Atherton Aff., C.A. App. 127),[2] their

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[2] "C.A. App." refers to the joint appendix filed in the court of appeals; "Atherton Aff." refers to the affidavit of Alfred L. Atherton, Jr., an Ambassador at Large with special responsibilities for Middle East negotiations, filed by the Department in support of its exemption claims.

disclosure would clearly pose a risk of injury to " 'the consultative functions of government' " (*EPA* v. *Mink*, *supra*, 410 U.S. at 87, quoting *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958)). They therefore constitute "legal advice" that, as the court of appeals correctly observed (Pet. App. 7a), "fits exactly within the deliberative process rationale for Exemption 5."

Petitioner also erroneously argues (Pet. 8-10) that the memoranda at issue are "final" decisions that constitute the "working law" of the Department and therefore cannot be advisory memoranda protected by Exemption 5. In making this argument, petitioner relies primarily on another decision of the court below, *Coastal States Gas Corp.* v. *Department of Energy*, 617 F. 2d 854 (D.C. Cir. 1980). This, of course, amounts to an assertion that the court of appeals misapplied its own precedent, a claim that this Court does not normally review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, *Coastal States* is clearly distinguishable. It concerned interpretations of Department of Energy petroleum pricing and allocation regulations provided by the Department's regional counsel in response to inquiries by agency auditors who needed to know how to apply the regulations to particular fact patterns in the course of determining whether audited firms had committed violations. *Coastal States Gas Corp.* v. *Department of Energy*, *supra*, 617 F. 2d at 858-859. The regional counsel memoranda were, moreover, indexed and referred to as precedent. *Id.* at 860. The *Coastal States* court contrasted those interpretive memoranda to lower-level staff with "advice to a superior," which it indicated is properly considered an element of the agency deliberative process protected by Exemption 5. *Id.* at 868. The court below reiterated that distinction (Pet. App. 8a), observing that the "flow of advisory material [in this case] is exactly opposite to the paradigm of 'final opinions,' which typically flow

from a superior with policy-making authority to a subordinate who carries out the policy" (footnote omitted). It noted further (Pet. App. 9a) that there is a significant distinction between "working law" of an agency and advisory memoranda consulted by officials with discretion to follow the advice or not, as its persuasive value dictates. Accordingly, the court of appeals correctly concluded that the memoranda at issue here, which petitioner concedes (Pet. 9) are analyses that the Secretary of State merely "takes cognizance of" in the course of formulating the government's foreign policy, are documents that "clearly qualify for protection under FOIA Exemption 5" (Pet. App. 9a).[3]

Finally, there is no merit to petitioner's claim (Pet. 10) that because the district court failed to make an in camera inspection of the documents or to permit the discovery sought by petitioner, the court could not properly enter summary judgment in favor of the government. Petitioner concedes that the "withheld documents" are "*interpretations* of publicly available facts" (Pet. 8; emphasis added) and that they were prepared for the Secretary of State by subordinates for use in the making of foreign policy (Pet. 9). Given (1) the agreement of the parties on these facts, (2) the detailed discussion of the memoranda in the affidavits of Ambassador Atherton and others (see Pet. App. 10a),

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[3]Petitioner also relies on *Mead Data Central, Inc.* v. *United States Department of the Air Force*, 566 F. 2d 242 (D.C. Cir. 1977), which he mischaracterizes (Pet. 9-10) as a case in which opinions of the Judge Advocate General and other legal memoranda that were "utilized as background by Air Force officials in contract negotiations" were "determined, for the most part, to be outside the scope of Exemption Five." In fact, the court indicated that only one of seven memoranda at issue seemed clearly outside the scope of Exemption 5 (566 F. 2d at 257-258); it remanded for additional findings on all of the memoranda and suggested that the six others would be protected by Exemption 5 if shown to be "advisory material, containing opinions and recommendations" without reasonably segregable factual portions (*id.* at 256-257; see also *id.* at 254-255 n.28).

(3) the lack of any indicia of bad faith, and (4) the settled principle that in camera review of documents in FOIA cases is discretionary (see, *e.g.*, *EPA* v. *Mink*, *supra*, 410 U.S. at 92-93; *Hayden* v. *National Security Agency/Central Security Service*, 608 F. 2d 1381, 1384-1388 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980); *Maroscia* v. *Levi*, 569 F. 2d 1000, 1003 (7th Cir. 1977); *Bell* v. *United States*, 563 F. 2d 484, 487 (1st Cir. 1977)), the court of appeals correctly concluded that the district court did not err in granting summary judgment in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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